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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hytex Industries Inc.

Serial No. 75/783,289

Charles Hieken of Fish & Richardson P.C. for Hytex Industries Inc.

Bridgett Smith, Trademark Examining Attorney, Law Office 115
(Tomas Vlcek, Managing Attorney).

Before Hohein, Bottorff and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Hytex Industries Inc., has appealed from the final refusal of the Trademark Examining Attorney to register the mark BEDFORD for "decorative vertical textiles; namely, acoustical panels for vertical surfaces for buildings sold to the commercial interiors market through a distribution network of

professionals who are with interior designers, facility managers and contractors in their respective markets."¹

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark BEDFORD VILLAGE for "prefinished wall paneling"² and the mark BEDFORD PARK for "wallpaper sample" and "wallpaper,"³ each owned by a different entity, as to be likely to cause confusion.

When the refusal was made final, applicant appealed.⁴ Briefs have been filed, but an oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services. See *Federated Foods, Inc. v. Fort Howard*

¹ Application Serial No. 75/783,289, filed August 24, 1999, alleging dates of first use and first use in commerce in 1984.

² Registration No. 1,470,675 owned by Georgia-Pacific Corporation; issued December 29, 1987; Sections 8 and 15 affidavits accepted and acknowledged, respectively.

³ Registration No. 1,980,620 owned by Rosedale Wallcoverings Inc.; issued June 18, 1996 under Section 44 of the Trademark Act.

⁴ A final requirement for acceptable specimens was withdrawn by the Examining Attorney in her appeal brief and is therefore moot.

Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976) and In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999).

Turning first to the goods, the Examining Attorney contends that applicant's and registrants' goods are related in that they are, in each case, decorative wall coverings. To support her position, the Examining Attorney has made of record third-party registrations purporting to show that the same marks are registered for various types of decorative wall coverings. In addition, the Examining Attorney has submitted excerpts of articles from the NEXIS database which, according to the Examining Attorney, show that "paneling and wallpaper...[are used] as a complement to one another" and that the respective goods travel in the same channels of trade to the same purchasers. While noting that applicant's identification of goods is restricted to professional purchasers and commercial channels of trade, the Examining Attorney points out that there are no such limitations in either of the cited registrations and contends that although such purchasers may be knowledgeable in a particular field, they are not necessarily knowledgeable about trademarks.

Applicant argues, based on the market and purchaser limitations in its identification of goods, that registrants' respective products, wall paneling and wallpaper, are different goods in different classes than applicant's "decorative vertical

textiles; namely, acoustical panels for vertical surfaces for buildings sold to the commercial interiors market...". Applicant maintains that the differences in the goods "are such that these knowledgeable professionals" in the relevant field "would recognize that the respective goods come from different sources."

To begin with, the question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the goods be identical or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Nevertheless, in this case, registrant's broadly described wall paneling offered under the BEDFORD VILLAGE mark must be deemed to encompass applicant's wall coverings described as "decorative vertical textiles, namely acoustical panels" for walls (or specifically "vertical surfaces for buildings"). Thus,

these goods must be considered legally identical, directly competitive products.⁵

Moreover, applicant's "decorative vertical textiles; namely, acoustical panels for vertical surfaces for buildings" and the wallpaper offered under the BEDFORD PARK mark are at least closely related products. Despite different wording, the respective identifications describe goods which have overlapping, if not interchangeable, functions and purposes. Applicant's products are essentially wall coverings consisting of decorative and sound insulated fabric panels.⁶ Wallpaper may be constructed of the same fabric materials as applicant's wall coverings and, like those wall coverings, may provide a sound-insulating as well as decorative function.⁷ For example, a NEXIS article from *The Connecticut Law Tribune* (February 4, 1991) refers to this type of utilitarian function in the context of office design: "...a common problem in office design is too-thin walls. An interior

⁵ We would also point out that the classification of goods is an administrative matter and is not significant in determining whether goods are related.

⁶ The Board takes judicial notice of the definition of "textile" as "[a] cloth, especially one manufactured by weaving or knitting; a fabric." (*The American Heritage Dictionary of The English Language* (4th ed. 2000)).

⁷ Wallpaper is defined in *The Random House Dictionary of the English Language* (Second ed. Unabridged 1987) as "any fabric, foil, vinyl material, etc., used as a wall or ceiling covering." In *The New Encyclopaedia Britannica* (15th ed. Vol. 12), "wallpaper" is described as an "ornamental and utilitarian covering for walls...." The Board takes judicial notice of these reference works.

designer might recommend acoustical panels or wallpaper and acoustical ceiling tiles that would contain the sound...".⁸

We note that applicant's identification of goods is restricted to professional purchasers in commercial markets. However, in the absence of any restriction in either of the cited registrations, we must assume that registrants' wall coverings may be sold, not only through the consumer marketplace, but also through the same commercial markets as applicant's and to the same commercial buyers such as hotels, office buildings and restaurants.

We agree with applicant that the overlapping customers for the respective goods would be relatively careful and knowledgeable professionals. However, even knowledgeable buyers of commercial goods are not immune from source confusion, particularly under circumstances where those purchasers are buying directly competitive products under similar marks. See,

⁸ In determining that the respective products are related, however, the remaining NEXIS references, for the most part, are not particularly useful in that they do not refer to the types of goods applicant provides under its mark (for example, applicant provides wall coverings not ceiling coverings) or they do not reflect the relevant, commercial market and purchasers for the goods. Nor did we find the three third-party registrations made of record by the Examining Attorney to be persuasive. Only one of the registrations tends to support a claim that fabric wall coverings and acoustic panels are related. One other registration is not based on use, and a third registration does not include the goods identified in the application.

e.g., *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1547, 14 USPQ2d 1840 (Fed. Cir. 1990).

Thus we turn our attention to the marks, keeping in mind that when marks would appear on identical or closely related goods, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant refers to the "evident differences" in the marks noting specifically that "the registered marks contain VILLAGE and PARK, respectively, whereas applicant's mark does not." Applicant also points to the coexistence of these two registrations reasoning that "if these two marks have been ruled by the Patent and Trademark Office not confusingly similar to each other for the goods designated in the registrations owned by different entities, a fortiori neither is confusingly similar to BEDFORD for [the identified goods]."

When compared in their entireties, applicant's mark BEDFORD is similar in sound, appearance and commercial impression to the cited marks BEDFORD VILLAGE and BEDFORD PARK. The word BEDFORD is applicant's entire mark and is visually and aurally a significant part of each registered mark. As the first word purchasers will see or hear when encountering registrants' marks, BEDFORD creates a strong impression and is likely to be

remembered by purchasers when they encounter applicant's mark BEDFORD on very similar goods at a different time.

Moreover, the addition of the word VILLAGE or the word PARK to BEDFORD does not significantly change the meaning or commercial impression created by the word BEDFORD alone. Applicant's mark BEDFORD and the mark BEDFORD VILLAGE or BEDFORD PARK connote variations of the same geographic place. Because these geographic terms convey a similar and, in each case, arbitrary meaning in relation to these closely related or directly competitive goods, purchasers are likely to assume that BEDFORD identifies a different line of registrants' wall coverings rather than a different source for those products.

The fact that the two cited marks coexist on the register is irrelevant to our determination. The similarity of the cited marks to each other is not in issue and, in any event, the mark applicant is seeking to register, the word BEDFORD alone without any additional wording, is more similar to each of the cited marks than they are to each other.⁹

⁹ With its brief, applicant submitted a printout from the TESS database showing a list of third-party applications and registrations for marks containing the term "Bedford." The Examining Attorney objected to this submission as untimely. In response, applicant, in its reply brief, argued that it is entitled to rely on Office records to support its case and requested that the Board remand the application to the Examining Attorney for consideration of the evidence. The evidence is untimely under Trademark Rule 2.142(d) and applicant has not shown good cause to remand the application to the Examining Attorney. See TBMP § 1207.02. Therefore, the request to remand is denied, and the evidence will not be considered. In any event, the Board does not take judicial

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Decision: The refusal to register is affirmed.

notice of applications or registrations residing in the Office and a mere listing of them, unsupported by copies, is not sufficient to make them of record. See *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). Moreover, a list of marks alone, apart from the goods or services on which the marks are used, is of no probative value.